Supreme Court, U.S.
FILED

No. 051232 MAR 22 2006

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IN THE

Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, AND UMIXBABY,

Petitioners,

v.

LUV N' CARE, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should resolve a significant and entrenched circuit split and hold that the Fifth Circuit erred in applying the "stream of commerce" test described in a plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), and thereby concluding that petitioner's sales of its product free and clear to a retailer who directed that product into the forum state were sufficient to subject petitioner to personal jurisdiction, even though numerous other circuits and states apply a "stream of commerce plus" test set forth in a different plurality opinion in *Asahi*, under which petitioner plainly would not have been subject to personal jurisdiction in the forum state.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties are respondents in this proceeding:

Joe P. Guerriero
Morris E. Cohen
Nouri Edward Hakim
Jack Hakim
Joseph Hakim
All similarly situated persons.

The following parties are affiliated with petitioners in this proceeding:

Keith Cross
Thomas M. Hayes
James Holley, Jr.

Petitioner Insta-Mix, Inc. is a Colorado corporation. It does business under the name Umix, Inc., and has done business under the names Umix, Inc., Umixproducts, Inc., Umix Sports, Inc., Umixpro, and Umixbaby.

There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Insta-Mix, Inc.

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Hill v. Showa Denko, K.K.,
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Hollingsworth & Vose Co. v. Connor,
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Other Authorities

Andrew Kurvers Spalding, Note: *In the Stream of Commerce Clause: Revisiting Asahi in the Wake of Lopez and Morrison*, 4 NEV. L.J. 141 (2003) 3, 12, 13

Diane S. Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503 (2003) 3, 10

Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. Rev. 729 (1988) 11

Richard M. Elias, *In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 Mo. L. Rev. 99 (2002) 7

Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53 (2004) 3, 13

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PETITION FOR CERTIORARI

Petitioner Insta-Mix, Inc. ("Insta-Mix") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 438 F.3d 465 (App. 1-18). The order of the district court accepting the magistrate judge's recommendation to grant petitioner's motion to dismiss for lack of personal jurisdiction (App. 19-20) was not reported. The magistrate judge's recommendation to grant petitioner's motion to dismiss for lack of personal jurisdiction (App. 21-27) also was not reported.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2006. App.1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Circuit Judge DeMoss urged the Court to grant certiorari, stating that "I hope Insta-Mix will apply for a writ of certiorari and I urge the Supreme Court to take up the minimum contacts issue and resolve it and the increasing

circuit divide with clarity." App. 17. The question presented is whether courts have personal jurisdiction over a defendant who places products in the stream of commerce and expects that they will or may reach the forum state but who does not purposefully direct activities toward the forum state. The courts of appeals are badly split over this issue. At least three circuits use the sparse "stream of commerce" test first mentioned in dicta in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and further refined in a plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). On the other hand, at least four other circuits use the "stream of commerce plus" test discussed in another plurality opinion in *Asahi*, which requires that the defendant take purposeful action directed towards the state beyond merely placing an item into the stream of commerce.

The *Asahi* opinions have left the federal and state courts badly split as they grapple with an issue that impacts due process and state sovereignty. In the 26 years since *World-Wide Volkswagen* and the 19 years since *Asahi*, a sea change has occurred in the world of commerce. This change has resulted largely from widespread use of the Internet, along with the rise of the global economy and the greatly increased market presence of national retailers like Wal-Mart. Now, even the smallest of domestic and foreign companies have access to our national retail markets through the Internet and through sales to national retailers.

Contests over personal jurisdiction based upon sales to third parties recur frequently, and there is great need for a national, uniform rule. The fact that some circuits (and states) are defining the limits of personal jurisdiction under the Constitution more narrowly than are other circuits (and states) means either that some courts are exercising jurisdiction that they lack or that other courts are abdicating

their responsibilities by failing to properly exercise their own jurisdiction. In any event, the lack of uniformity subjects those entities selling products for nationwide distribution to significant uncertainty regarding a fundamental and, unfortunately, all too pressing business concern – whether they may be haled into court in any or every jurisdiction in which their product is sold, regardless of whether it is their purpose to sell it there. This uncertainty has worsened significantly in the almost two decades since *Asahi* was decided, such that commentators now refer to personal jurisdiction after *Asahi* as a "quagmire," with "confusion and disagreement [being] the order of the day."[1]

The Court should now resolve this conflict.

STATEMENT OF THE CASE

Insta-Mix is a Colorado corporation located solely in Colorado Springs, Colorado. It makes and sells innovative infant and toddler feeding products. This case involves a feeding bottle with a patented bottom freeze plug designed to keep liquid cool. Insta-Mix advertised and sold the bottles on its website and shipped them to certain states (not including Louisiana). In addition, it sold its bottles to major retailers. The vast majority of its bottles were

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[1] *E.g.*, Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again, 54 CATH. U. L. REV. 53, 147 (2004) ("confusion and disagreement"); Andrew Kurvers Spalding, Note: In the Stream of Commerce Clause: Revisiting *Asahi* in the Wake of *Lopez* and *Morrison*, 4 NEV. L.J. 141, 155 (2003) ("quagmire"); Diane S. Kaplan, Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine, 55 BAYLOR L. REV. 503, 586 (2003) (describing personal jurisdiction as being in a state of "confusion [and] controversy").